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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/827,834	04/06/2001	Jeffrey John Kester	8043M	6353

27750 7590 12/07/2001

THE PROCTER & GAMBLE COMPANY  
PATENT DIVISION  
WINTON HILL TECHNICAL CENTER  
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EXAMINER

STILLER, KARL J

ART UNIT

PAPER NUMBER

1617

DATE MAILED: 12/07/2001

Please find below and/or attached an Office communication concerning this application or proceeding.

# Office Action Summary

Application No.

09/827,834

Applicant(s)

KESTER ET AL.

Examiner

Karl Stiller

Art Unit

1617

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

## Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 1 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

## Status

- 1) ☐ Responsive to communication(s) filed on \_\_\_\_.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

## Disposition of Claims

- 4) ☒ Claim(s) 1-28 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_ is/are allowed.
- 6) ☐ Claim(s) \_\_\_\_ is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_ is/are objected to.
- 8) ☒ Claim(s) 1-28 are subject to restriction and/or election requirement.

## Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) ☐ The proposed drawing correction filed on \_\_\_\_ is: a) ☐ approved b) ☐ disapproved by the Examiner.  
If approved, corrected drawings are required in reply to this Office action.
- 12) ☐ The oath or declaration is objected to by the Examiner.

## Priority under 35 U.S.C. §§ 119 and 120

- 13) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).  
a) ☐ All b) ☐ Some \* c) ☐ None of:  
1. ☐ Certified copies of the priority documents have been received.  
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_.  
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).  
\* See the attached detailed Office action for a list of the certified copies not received.
- 14) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).  
a) ☐ The translation of the foreign language provisional application has been received.
- 15) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

## Attachment(s)

- 1) ☐ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO-1449) Paper No(s) \_\_\_\_.
- 4) ☐ Interview Summary (PTO-413) Paper No(s) \_\_\_\_.
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other:

## DETAILED ACTION

### *Election/Restrictions*

Restriction to one of the following inventions is required under 35 U.S.C. 121:

- I. Claims 1-16, 23 (in part insofar as it reads on the invention of Group I), 27, and 28 drawn to a composition or food, comprising a mixture of beta-glucan soluble fiber or a source of beta-glucan soluble fiber, and a non-digestible fat or a source of non-digestible fat in the amounts recited herein, diversely classified in Classes 426, 514, 554, etc., for example, 426/601, 426/611, 514/23, 554/164, etc.
- II. Claims 17-22, drawn to a method of reducing blood cholesterol (or) controlling postprandial blood glucose and insulin levels in a patient, comprising administering beta-glucan soluble fiber or a source of beta-glucan soluble fiber, and a non-digestible fat or a source of non-digestible fat; or orally administering a mixture of beta-glucan soluble fiber or a source of beta-glucan soluble fiber, and a non-digestible fat or a source of non-digestible fat in the amounts recited herein, diversely classified in Classes 426, 514, 554, etc., for example, 426/601, 426/611, 514/23, 554/164, etc.
- III. Claims 23-26, drawn to a dough composition, comprising a sufficient amount of beta-glucan soluble fiber or a source of beta-glucan soluble

fiber in the amounts recited herein, diversely classified in Classes 426, 514, 554, etc., for example, 426/601, 426/611, 514/23, 554/164, etc.

The inventions are distinct, each from the other because of the following reasons:

Inventions I and II are related as product and process of use. The inventions can be shown to be distinct if either or both of the following can be shown: (1) the process for using the product as claimed can be practiced with another materially different product or (2) the product as claimed can be used in a materially different process of using that product (MPEP § 806.05(h)). In the instant case the product as claimed can be used in a materially different process, for example, in a method of weight reduction.

Inventions III and I are related as mutually exclusive species in an intermediate-final product relationship. Distinctness is proven for claims in this relationship if the intermediate product is useful to make other than the final product (MPEP § 806.04(b), 3rd paragraph), and the species are patentably distinct (MPEP § 806.04(h)). In the instant case, the intermediate product is deemed to be useful as a dough and the inventions are deemed patentably distinct since there is nothing on this record to show them to be obvious variants. Should applicant traverse on the ground that the species are not patentably distinct, applicant should submit evidence or identify such evidence now of record showing the species to be obvious variants or clearly admit on the record that this is the case. In either instance, if the examiner finds one of the inventions anticipated by the prior art, the evidence or admission may be used in a rejection under 35 U.S.C. 103(a) of the other invention.

Inventions II and III are unrelated. Inventions are unrelated if it can be shown that they are not disclosed as capable of use together and they have different modes of operation, different functions, or different effects (MPEP § 806.04, MPEP § 808.01). In the instant case the different inventions have different functions. The invention of Group II is a method which functions to reduce blood cholesterol (or) control postprandial blood glucose and insulin levels in a patient, whereas the invention of Group III is an intermediate rather than a final composition. Because these inventions are distinct for the reasons given above and have acquired a separate status in the art because of their recognized divergent subject matter, restriction for examination purposes as indicated is proper.

#### ***Species Election***

In addition to electing one invention from Groups I-III, applicant is further required to make the following specie election:

Claims 1-28 are generic to a plurality of disclosed patentably distinct species comprising non-digestible fat or sources of non-digestible fat. Applicant is required under 35 U.S.C. 121 to elect a single disclosed species which is a single disclosed non-digestible fat or source of non-digestible fat, even though this requirement is traversed.

The search for all species of non-digestible fats or sources of non-digestible fat presents an undue burden on the office due to the structural dissimilarity of species useful herein and their correspondingly diverse classification. For example, acylated propylene oxide-extended glycerols are diversely classified in Class 426, for example, Subclasses 601, 605, 611, etc.; esterified epoxide-extended polyols are diversely

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classified in Class 554, for example, Subclasses 164, 168, 169, etc.; polyol fatty acid polyesters are diversely classified in Class 514, for example, Subclasses 23, 552, 558, etc. Please also note that the search is not limited to the patent files.

Should applicant traverse on the ground that the species are not patentably distinct, applicant should submit evidence or identify such evidence now of record showing the species to be obvious variants or clearly admit on the record that this is the case. In either instance, if the examiner finds one of the inventions unpatentable over the prior art, the evidence or admission may be used in a rejection under 35 U.S.C. 103(a) of the other invention.

A telephone call to the attorney is not required where: 1) the restriction requirement is complex, 2) the application is being prosecuted pro se, or 3) the examiner knows from past experience that a telephone election will not be made (MPEP § 812.01). Therefore, since this restriction and specie election is considered complex, a call to the attorney for a telephonic election was not made.

Applicant is advised that the reply to this requirement to be complete must include an election of the invention to be examined even though the requirement be traversed (37 CFR 1.143). Any inquiry concerning this communication or earlier communications from the examiner should be directed to Karl Stiller whose telephone number is 703-306-3219. The examiner can normally be reached Monday through Friday, 8:30 AM to 5:00 PM.

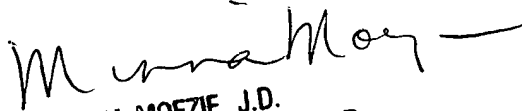
If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Minna Moezie can be reached at 703-308-4612. The fax phone number for

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the organization where this application or proceeding is assigned is 703-308-4556 for regular communications.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is 703-308-1235.

Stiller: ks  
December 4, 2001

  
MINNA MOEZIE, J.D.  
SUPERVISORY PATENT EXAMINER  
TECHNOLOGY CENTER 1600